UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KIM M. YORK, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 03-99-P-H***
	)	
TOWN OF LIMINGTON, MAINE,	***)***	
	)	
Defendant	***)***	
	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant Town of Limington, Maine ("Town") moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims against it by Kim M. York, Michael D. York, Sr. (both, "Yorks") and Burning Rose Land Development, LLC ("Burning Rose") (all three, "Plaintiffs") in this action arising from a 2003 amendment to the Town's growth-management ordinance. *See* Defendant's Motion To Dismiss ("Motion") (Docket No. 5); Complaint for Declaratory and Injunctive Relief ("Complaint") (Docket No. 1) at 1. For the reasons that follow, I recommend that the Motion be granted in part and denied in part.

I. Applicable Legal Standards

"In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). In this case, I also

take cognizance of the text of the revised ordinance, which is both integral to and appended to the Complaint. *See generally* Complaint; Growth Ordinance – Limington, Maine ("Amended Ordinance"), attached thereto as Exh. A; *see also, e.g., Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) ("When the factual allegations of a complaint revolve around a document whose authenticity is unchallenged, that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).") (citations and internal quotation marks omitted).

A defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

II. Factual Context

For purposes of this Motion I accept the following relevant facts as true:

The Yorks, husband and wife, are residents of the Town. Complaint ¶ 1. Burning Rose is a Maine limited liability company with a principal place of business in Standish, Maine. *Id*. ¶ 2. Its members are Michael York, Sr. (fifty-one percent), Kim York (thirty-nine percent) and Michael York, Jr. (ten percent). *Id*.

The Town adopted a growth-management ordinance in or about March 1997. *Id*. ¶ 5. In or about March 2003, on recommendation of its Planning Board, the Town amended the ordinance to further limit the availability of residential growth-management permits ("Permits"). *Id*. ¶ 6. The ordinance, as then revised, provides, in relevant part:

Article 2. DEFINITIONS

2.1 Unless otherwise indicated, all terms used in this Ordinance will be construed to have the same meanings as defined in the Town Zoning Ordinance, or if not defined in the Town Zoning Ordinance, they will be construed to have their plain and ordinary meaning.
2.2 For purposes of this Ordinance, the term "persons related to" shall mean: spouse, parent, brother, sister or child related by blood, marriage or adoption.
2.3 For purposes of this Ordinance, the term "applicant" shall mean:
2.3.A. The person or entity in whose name a residential growth permit application is submitted to the CEO [Code Enforcement Officer] (the "named applicant");
2.3.B. If the named applicant is a natural person,
2.3.B.1. All persons related to the named applicant;
2.3.B.2. All entities in which the named applicant or any person related to the named applicant who [sic] owns or controls a 10% or greater interest
2.3.C. If the named applicant is other than a natural person,
2.3.C.1. All natural persons or entities with any ownership interest in the named applicant ("stakeholders");
2.3.C.2. All persons related to stakeholders of the named applicant
2.3.C.3. All entities in which a stakeholder or any person related to a stakeholder owns or controls a 10% or greater interest.
2.3.D. Any other person or entity when, in the discretion of the CEO, the failure to deem the person or entity to be an applicant would circumvent the purposes of this ordinance.

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Article 3. GENERAL REQUIREMENTS
3.1 All new dwelling units within the Town of Limington, whether permanent or seasonal, shall be in conformity with the provisions of this Ordinance. No new dwelling unit shall be placed or constructed which fails to meet the requirements of this Ordinance.

Article 4. PURPOSE
4.1 To prevent unreasonable burden on, and failure or shortage of, public facilities that is likely to result from unlimited growth.
4.2 To maintain the predominantly rural character of the town.
4.3 To provide for the local housing needs of Limington's existing residents, while accommodating Limington's "fair share" of population growth in York County and the immediate sub-region.
4.4 To ensure fairness in the allocation of building permits.

Article 5. . . . NUMBER OF BUILDING PERMITS AVAILABLE
5.1 The number of residential growth permits available to be issued in each permit year shall be thirty-five (35). After all permits authorized by this Ordinance have been issued in any permit year, the issuance of additional permits can be authorized only by the legislative body by referendum ballot.

5.2 In the event that fewer than 35 permits are issued in any one permit year, up to six of the unused permits may be issued in the following permit year, in addition to the 35 that would otherwise be available.

5.3 Under no circumstances may more than 41 growth permits be issued in any one permit year, except as specifically authorized by vote of the Municipal Legislative Body as provided in Article 5.1.

Article 6. ALLOTMENT

6.1 There will be a limit of four (4) residential growth permits issued per applicant per permit year. No applicant may have more than two (2) unused permits at any one time for single-family or two-family dwellings, nor more than three (3) unused permits at any one time for a 3-family dwelling, nor more than four (4) unused permits at any one time for a 4-family dwelling. A permits [sic] will be considered to have been used when the CEO has issued a certificate of occupancy for the dwelling unit for which it was issued.

6.2.A. All Growth Permit Applications shall be submitted in person to the Code Enforcement Officer (CEO) during normal office hours on the form designated Growth Permit Application. . . .

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6.3 Residential growth permits will be issued on a first-come, first-served basis by the CEO once they become available at the beginning of each permit year.

6.4 The CEO shall not accept any application from an applicant who already holds the maximum number of permits allowed under this Article.

6.5 The CEO shall use the Application Receipt date to determine the order in which each residential growth permit is distributed. The CEO shall keep an accurate listing of the applications submitted each permit year.

6.6 If no residential growth permits are available when an application is submitted, the listing shall be used as a waiting list. The waiting list shall expire at the end of the permit year. However, all applicants who still wish to obtain a permit must notify the CEO in writing no earlier than February [sic] of the permit year and no later than February 15 of the permit year, that they wish their application to continue to the next permit year. The applications of all persons who so notify the CEO shall be preserved as the first applications in the new permit year.

6.7 A Residential Growth Permit will expire 60 days after Application Receipt date if a building permit has not been issued for that Growth Permit.

6.8 Residential growth permits issued in accordance with this Ordinance shall expire ninety days after the date of issuance of a building permit, unless foundations have been completed or an extension has been granted by the Code Enforcement Officer ("CEO") due to adverse weather conditions.

Article 7 NON-TRANSFERABILITY

7.1 Residential growth permits shall be site-specific, and shall be valid for construction only on the lot specified on the application. However, said permits shall be transferable to new owners of the lot, should the property change hands. A residential growth permit which is transferred not in accordance with this Ordinance shall be nullified and revoked by the CEO.

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> Article 11. VIOLATIONS AND PENALTIES
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> 11.1 A violation of this Ordinance shall be deemed to exist when any person or entity engages in any construction activity directly related to the erection, creation, or placement of a dwelling unit upon any land within the Town of Limington without having first obtained a Residential Growth Permit from the CEO. If a dwelling unit has been erected, created, or placed without a Growth Permit, it shall also be deemed a violation for any person or entity to sell, lease, rent, or convey such dwelling unit until such a permit has been duly issued.
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> 11.2 It shall be the duty of the CEO to enforce the provisions of this Ordinance. If the CEO shall find that any provision of this Ordinance is being violated, he shall notify, in writing, the person responsible for such violations, indicating the nature of the violations and ordering the action necessary to correct it. He shall order the removal of illegal buildings, structures, additions or work being done, or shall take any other action authorized by this Ordinance to insure compliance with, or to prevent violation of, its provisions.
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> 11.3 When any violation of any provision of this Ordinance shall be found to exist, the Municipal Officers, upon notice from the CEO, are hereby directed to institute any and all actions and proceedings, either legal or equitable, including seeking injunctions and the imposition of fines, that may be appropriate or necessary to enforce the provisions of this Ordinance in the name of the Town of Limington. The Municipal Officers, or their authorized agents, are hereby authorized to enter into administrative consent agreements for the purpose of eliminating violations of this Ordinance and recovering fines without court action. Such agreements shall not allow an illegal structure or use to continue unless the removal of the structure or use will result in a threat or hazard to public health and safety or will result in substantial environmental damage.
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> 11.4 Any person being the owner, contractor or having control or use of any structure or premises who violates any of the provisions of this Ordinance shall upon conviction be fined in accordance with provisions of 30-A M.R.S.A. §4452. Each day such a violation is permitted to exist after notification shall constitute a separate offense. Fines shall be payable to the Town of Limington.

Amended Ordinance.

Since the enactment of the original growth-management ordinance, only thirty-five Permits have been available to persons who want to build residences in each year, and a Permit is a condition precedent to obtaining any new residential building permit. Complaint ¶ 7.

Many persons who are either in the construction business or want to build family homes in the Town are related by blood or marriage to the Yorks or may be included in the class of persons whose application for a Permit would result in a denial of applications by the Plaintiffs. *Id*. ¶ 10. Each of the Plaintiffs owns

residential property in the Town that requires a Permit under the Amended Ordinance to be developed. *Id.* ¶ 12.

On April 22, 2003 Kim York applied for a Permit to build a new single-family home on property she owns at Map R-5 (portion of Lot 10A). *Id*. ¶ 13. The CEO denied the application on the basis that her son Michael York, Jr. possessed two unused Permits. *Id*. Kim York cannot even get on the waiting list for a Permit for her new home so long as her relatives, or persons determined by the CEO to be related to her, possess in the aggregate two Permits. *Id*. ¶ 14.

On April 22, 2002 Burning Rose applied for a Permit to develop property it owns at Map 9, Lot 13. *Id*. ¶ 17. Burning Rose was denied the right even to get onto the waiting list for a Permit on the basis that Michael York, Jr. had two outstanding Permits. *Id*. Burning Rose could have been denied on the basis of the family relationship between Michael York, Jr. and other members of Burning Rose had the CEO reached that issue. *Id*. Burning Rose will be unable to get on the waiting list for a Permit so long as any aggregation of York family relatives, including persons determined by the CEO to be relatives for purposes of the Amended Ordinance, possess two Permits or had four Permits within the year. *Id*. ¶ 18.

Neither the Amended Ordinance nor any other Town ordinance provides any appellate process for review of decisions of the CEO made pursuant to the Amended Ordinance. *Id*. ¶ 15. The Limington Board of Appeals has ruled that it has no appellate jurisdiction over decisions of the CEO made pursuant to the Amended Ordinance. *Id*. ¶ 16.

At meetings preceding adoption of the Amended Ordinance, the ordinance was referred to as the "Mike York Ordinance" and there were many references to "You Know Who" (meaning Michael York, Sr. and his family). *Id*. ¶ 21. Prior to recommending adoption of the Amended Ordinance at a Town meeting, members of the Planning Board publicly and privately discussed the size of the York family. *Id*. ¶

22. Prior to recommending adoption of the Amended Ordinance at a Town meeting, members of the Planning Board accused Michael York, Sr. of acting illegally or immorally in connection with various developments and/or Permits and threatened to punish him. *Id*. ¶ 23.

III. Analysis

The Complaint alleges that the Amended Ordinance:

(i) constitutes a bill of attainder in violation of the federal Constitution (Count I), *id*. ¶¶ 20-24;

(ii) both on its face, and as applied to the Plaintiffs, violates the equal-protection and/or due-process clauses of the federal and Maine constitutions by virtue of its arbitrary and discriminatory limitation on the number of Permits for which persons who are (or are perceived to be) in a close family relationship may apply (Count II), *id*. ¶¶ 25-30;

(iii) offends the due-process clauses of the federal and Maine constitutions and the equal-protection clause of the federal Constitution by virtue of its irrebuttable presumption that certain family members are interested in Permits issued to other family members (Count III), *id*. ¶¶ 31-35;

(iv) confers unreviewable discretion upon the code enforcement officer, in violation of the separation-of-powers provision of the Maine constitution and the due-process clause of the federal Constitution (Count III(B)), *id*. ¶¶ 36-38;[1]

(v) is not reasonably necessary for the accomplishment of any real or legitimate purpose in the exercise of police power, in violation of the directive of the Maine constitution that legislative enactments be reasonable (Count IV), *id*. ¶¶ 39-41; and

(vi) violates 42 U.S.C. § 1983 (Count V), *id*. ¶¶ 42-44.

[1] In an evident typographical error, the Complaint sets forth two Count IIIs. To avoid confusion, I have termed the
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The Town seeks dismissal of all claims against it. *See generally* Motion. In response, the Plaintiffs clarify and narrow the scope of their claims, representing that all counts of their complaint other than Count I (their bill-of-attainder claim) assert violations of substantive due process. *See* Plaintiffs' Opposition to Defendant's Motion To Dismiss ("Opposition") (Docket No. 7) at 6 & n.4.[2] For purposes of analysis, the Plaintiffs divide their claims into three groups: (i) bill of attainder, (ii) substantive due process, and (iii) vesting of unreviewable discretion in the CEO. *See generally* Opposition. I follow that analytical framework, addressing each of the three groupings in turn.

A. Bill of Attainder (Count I)

A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adminstrator of Gen. Servs.*, 433 U.S. 425, 468 (1977). "In passing a bill of attainder, the [legislature] departs from its constitutional role of providing general rules for the government of society and usurps the judicial role by making a legislative determination of guilt." *Phillips v. Iowa*, 185 F. Supp.2d 992, 1000 (N.D. Iowa 2002) (citation and internal quotation marks omitted). "The danger of such a law is that it deprives the accused of the protections afforded by judicial process." *Id*. (citation and internal quotation marks omitted).

Three requirements must be met to establish the existence of a prohibited bill of attainder: "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Serv. Sys. v.*

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second one Count III(B).

[2] In so doing, the Plaintiffs effectively waive any equal-protection or procedural-due-process claim. *See United States v. Geronimo*, 330 F.3d 67, 76 (1st Cir. 2003) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (citations and internal punctuation omitted). The Plaintiffs understandably do not separately discuss their section 1983 claim (Count V), which the Town fails to discuss and which, in any event, hinges on the viability of their other federal claims. *See Cruz-Erazo v. Rivera-Montañez*, 212 F.3d 617, 621 (1st Cir. 2000) ("As is well established, § 1983 creates no independent substantive rights, but rather provides a cause of action by which individuals may seek money damages for governmental violations of rights protected by federal law."). Accordingly, I do not consider omission of any mention of that claim a waiver.

Minnesota Pub. Interest Research Group, 468 U.S. 841, 847 (1984) (footnote omitted). The Town contends that the Complaint fails to set forth facts sufficient to meet any of these three elements. *See* Motion at 4-5. I find that, as concerns the essential element of specificity, the Complaint falls short even of fitting within what the First Circuit has described as the "generous framework" of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), pursuant to which a "'court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Torres-Viera v. Laboy-Alvarado*, 311 F.3d 105, 108 (1st Cir. 2002) (quoting *Swierkiewicz*, 534 U.S. at 514). Inasmuch as that defect alone is fatal to the cause of action, I need not and do not reach the balance of the Town's arguments concerning Count I.

As the Town points out, *see* Motion at 5, the Amended Ordinance is facially neutral. It singles out the Plaintiffs neither by name nor by unique characteristics, such as identifiable affiliations or past conduct. *Compare, e.g., Minnesota*, 468 U.S. at 847 ("The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.") (citation and internal punctuation omitted); *United States v. Brown*, 381 U.S. 437, 450 (1965) (statute met specificity requirement when, rather than "set[ting] forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall not hold union office," it "designate[d] in no uncertain terms the persons who possess[ed] the feared characteristics and therefore [could not] hold union office without incurring criminal liability – members of the Communist Party.")(footnote omitted);[3]

[3] The Plaintiffs quote *Brown* in support of their argument that, as regards the specificity prong of attainder analysis, "it cannot be a defense to attainder that there may be other persons incidentally affected by the enactment in addition to those specifically targeted by the legislation." Opposition at 5; *see also Brown*, 381 U.S. at 449 n. 23 ("The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore *(continued on next page)*

SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 669-71 (9th Cir. 2002) (although question "close," statute met specificity requirement when, *inter alia*, it defined class of unnamed vessels to be excluded from Prince William Sound by reference to dates on which vessels spilled oil).

In this case, one reasonably can infer from the allegations of the Complaint that the Plaintiffs' situation catalyzed the Town's Planning Board to propose (and perhaps its voters to enact) the Amended Ordinance and that, as the Planning Board and voters may well have intended, its burden fell disproportionately heavily on the Plaintiffs. Nonetheless, neither the fact that legislation is motivated by, or disproportionately affects, a certain individual or group is enough to transform it into an impermissible bill of attainder. *See, e.g., Nixon*, 433 U.S. at 471 ("However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.") (footnotes omitted); *L C & S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 604 (7th Cir. 2001) ("That the plaintiffs were the target, and so far as appears the only target, of the amendment is plain. . . . But this does not establish that the amendment was not a bona fide legislative measure. It is utterly commonplace for legislation to be incited by concern over one person or organization. . . . Not the motive or stimulus, but the generality and consequences, of an enactment determine whether it is really legislation or really something else. If the Williamsport town council had imposed a fine on the plaintiffs, or provided that only the plaintiffs had to apply for permission to operate a tavern in the town's commercial district, the amendment would have lacked either prospectivity (in the first example) or generality (in the second); it might even have been a bill of attainder."); *WMX Techs., Inc. v. Gasconade*

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deserving of sanction, not that it has failed to sanction others similarly situated."). However, this passage from *Brown*
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County, Mo., 105 F.3d 1195, 1202 (8th Cir. 1997) (ordinance did not meet specification requirement although plaintiff was initially the only entity pursuing a project for which permit was required under ordinance; "Rather than attaching to a specified organization, the ordinance attaches to described activities in which an organization may or may not engage. Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one.") (citations and internal quotation marks omitted); *Specialty Malls of Tampa v. City of Tampa, Fla.*, 916 F. Supp. 1222, 1230 (M.D. Fla. 1996), *aff'd*, 109 F.3d 770 (11th Cir. 1997) ("[T]he Ordinance does not identify a particular individual to receive punishment. The Ordinance applies across-the-board to all similarly situated property owners. The fact that the Ordinance might be applied to the Plaintiffs simply does not make it an unconstitutional bill of attainder.").

The conclusion is inescapable that the Amended Ordinance is a law of general sweep and prospective application, affecting – from the date of its enactment onward – every Permit applicant whose family and business ties fall within its definitions. Even if the Plaintiffs can prove, consistent with the allegations of their Complaint, that the Town had them in mind in enacting the 2003 amendments, the ordinance simply does not specify them sufficiently to qualify as a bill of attainder. Count I accordingly should be dismissed for failure to state a claim as to which relief can be granted.

B. Substantive Due Process (Counts II, III & IV)

As this court recently noted:

> The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or

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cannot fairly be construed to negate the requirement that, to qualify as a bill of attainder, legislation must single out, by name or identifiable characteristics, specific individuals or groups.

> abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to a legitimate state interest.

Van Horn v. Town of Castine, 167 F. Supp.2d 103, 106 (D. Me. 2001) (quoting *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991) (internal punctuation omitted).

The First Circuit has further refined this test as it pertains to challenges to zoning ordinances:

> The test to be applied in considering substantive due process challenges to a land use ordinance was established early on: a court should not set aside the determination of public officers in zoning matters unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.

Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 243-44 (1st Cir. 1990) (citations, footnote and internal punctuation omitted).

The Plaintiffs posit that the Amended Ordinance offends substantive due process both on its face and as applied to them. *See* Opposition at 4. The two types of challenges are distinguishable::

> A "facial" substantive due process challenge to a land use ordinance bears important differences to an "as applied" substantive due process challenge to the same ordinance. . . . [W]hen one makes a "facial" challenge, he or she argues that *any* application of the ordinance is unconstitutional. He or she must show that, on its face, the ordinance is arbitrary, capricious, and not rationally related to a legitimate government interest. When one makes an "as applied" challenge, he or she is attacking only the decision that applied the ordinance to his or her property, not the ordinance in general. In this context, he or she must show that the government action complained of (i.e. denying a permit application) is "truly irrational."

WMX, 105 F.3d at 1198-99 n.1 (citation and internal quotation marks omitted) (emphasis in original).

The Town argues, among other things, that the Complaint fails to state a claim that the Amended Ordinance is arbitrary or capricious. *See* Motion at 11.

I first consider the Plaintiffs' facial challenge. The Town argues that the related-parties provision of the Amended Ordinance clearly serves the ordinance's legitimate objective to ensure fairness in the

allocation of building permits by "prevent[ing] a group of closely related individuals and/or entities from monopolizing, through collusion or otherwise, the relatively few permits that are available to property owners in a given year." *Id*. at 8. The Plaintiffs rejoin, *inter alia*:

> Classifying individuals by family connection in the allocation of the limited growth management permits is not a land use necessity – it is not even a *land use* consideration. Such a classification is unreasonable where the familial relationship operates irrespective to membership in the same household, or economic unit. Standing alone, such relationships are an insufficiently reliable indicator of "likelihood to conspire" to evade the limitations upon issuance of growth management permits to justify a *per se* disqualification based upon family relationship.

Opposition at 7 (footnote omitted) (emphasis in original).

The Town has the better of the argument. The Plaintiffs evidently do not question the Town's authority to limit its growth or to allocate its resultant scarce resources fairly. It is but a short leap, and entirely rational and legitimate, for the Town to desire to allocate those resources fairly among families – particularly in view of the fact the Amended Ordinance pertains to the building of residences. The means by which the Town does this furthers this legitimate end. The ordinance's "relational tests" apply to close family members (spouses, parents, brothers, sisters and children related by blood, marriage or adoption) and entities in which those close family members have an ownership interest. It is rational to presume that such close family members and related business entities are more likely than unrelated persons to "collude" with respect to, or at least share an interest in, each other's permits. In any event, even to the extent that any given close family member is not serving as a "straw" for another or is even remotely interested in another's business, it is rational for the Town to bar closely related family members and business entities from collectively holding a disproportionate share of the few residential-growth permits available in any given year.

In sum, inasmuch as "the State's objective is legitimate and the taxonomy adopted is rationally related to achieving that objective, . . . the law does not transgress due process." *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991) (citation and internal quotation marks omitted). The Plaintiffs could prove no set of facts that would dictate otherwise.

I turn next to the Plaintiffs' as-applied challenge. With respect to individual planning and zoning decisions, the First Circuit has observed that "a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes." *Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994) (citations and internal quotation marks omitted). The court has "left the door slightly ajar for federal relief based on substantive due process in truly horrendous situations"; nevertheless, "the threshold for establishing the requisite abuse of government power is a high one indeed." *Id*. (citations and internal punctuation omitted).

Such "horrendous" situations include decision-making based on political affiliation, belief or immutable characteristic of the plaintiff; they do not include a mere claim that a "board exceeded, abused or distorted its legal authority, often for some allegedly perverse (from the developer's point of view) reason." *Id*. at 349 (citation and internal punctuation omitted). This "approach to such claims in land use planning disputes" in turn rests on a "sound basis":

> Substantive due process, as a theory for constitutional redress, has been disfavored, in part because of its virtually standardless reach. To apply it to claims alleging that permitting officials were motivated by political factors and parochial views of local interests would be to insinuate the oversight and discretion of federal judges into areas traditionally reserved for state and local tribunals.

Id. at 350 (citation and internal punctuation omitted).

The Complaint alleges in relevant part that:

1. The Town's CEO denied Permit applications by Kim York and Burning Rose on the basis that Michael York, Jr. then possessed two unused Permits. *See* Complaint ¶¶ 13, 17.

2. The Burning Rose application could have been denied on the basis of the family relationship between Michael York, Jr. and other members of Burning Rose had the CEO reached that issue. *See id*. ¶ 17.

3. Kim York cannot even get on the waiting list for a Permit so long as any of her relatives or persons determined by the CEO to be related to her possess two Permits in the aggregate, and Burning Rose cannot even get on the waiting list for a Permit so long as any aggregation of York family relatives, including persons determined by the CEO to be relatives for purposes of the Ordinance, possess two Permits or had four Permits within the year. *See id*. ¶¶ 13, 18.

4. There are many persons who are either in the construction business or want to build family homes in the Town who are related by blood or marriage to the Yorks or who might be included in the class of persons whose application for a Permit will result in a denial of Applications by the Plaintiffs. *See id*. ¶ 10.

5. At meetings preceding adoption of the Amended Ordinance, the ordinance was referred to as the "Mike York Ordinance," and there were many references made to "You Know Who" (meaning Michael York, Sr. and his family). *See id*. ¶ 21.

6. Prior to recommending the ordinance to the Town meeting, members of the Planning Board (i) publicly and privately discussed the size of the York family and (ii) accused Michael York, Sr. of acting illegally or immorally in connection with various developments and/or Permits and threatened to punish him. *See id*. ¶¶ 22-23.

The Plaintiffs elaborate upon these allegations in their brief, noting, for example, that "any time that any combination of the Plaintiff Michael York, Sr.'s twenty-one (21) brothers, half-brothers, or brothers-in-law collectively hold two (2) or more growth management permits the Plaintiffs cannot apply for a permit" and asserting that "the foreseeable consequence and effect of the familial relationship rule, and the inability to even join the queue for future permit years, is to disqualify the Plaintiffs from *ever* obtaining any more permits." Opposition at 3-4 (emphasis in original).

The facts alleged in the Complaint reveal a straightforward, rather than arbitrary or irrational, application of an ordinance that I have already determined passes muster pursuant to a rational-basis test. One cannot reasonably infer that the ordinance's "foreseeable consequence and effect" is to disqualify the Plaintiffs from ever obtaining any more Permits. The Amended Ordinance merely bars closely related individuals and entities from collectively holding more than two unused Permits at any given time or from obtaining more than four Permits in any given year. When a Permit is either used or expires of its own terms from non-use, another Permit is available to that group of relatives, within the confines of the limits of four per year per grouping of relatives and thirty-five per year townwide. Even granting that the Yorks' family is large, that many are in the construction business and that many are interested in building residences in the Town, one cannot reasonably infer that the effect of the Amended Ordinance is to permanently bar the Plaintiffs from obtaining a Permit.

Nor does the alleged animus of members of the Planning Board toward Michael York, Sr. alter the outcome. The Complaint suggests that this animus stems from the perceived immoral or illegal conduct of Michael York, Sr. in connection with various developments and/or Permits. This is precisely the sort of parochial or political (as opposed to conscience-shocking) animus that the First Circuit has suggested cannot be redressed by way of substantive due process. *See, e.g., Licari*, 22 F.3d at 350; *also compare,*

e.g., Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45-46 (1st Cir. 1992) (noting that neither alleged revocation of architect's license to force his partner out of business nor alleged permit denial on ground of fear of political threat of homeowners' association qualified as sufficiently conscience-shocking to constitute substantive-due-process violation).

In short, the Plaintiffs could prove no set of facts, consistent with the allegations of the Complaint, that would state a substantive-due-process claim on an "as applied" basis.

Two more points remain to be addressed. The Plaintiffs allege that the Amended Ordinance implicates their fundamental rights to family association, to earn a living and to earn a return on their property. *See* Complaint ¶ 19. "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (footnote omitted). Nonetheless, in their opposing brief, the Plaintiffs assume that a rational-basis standard of review (rather than any type of heightened scrutiny) applies to their substantive-due-process claims. *See* Opposition at 6-10.

Assuming *arguendo* that the Plaintiffs do mean to suggest that a heightened standard of review is appropriate, I agree with the Town that the Complaint fails to state such a claim. As the Town suggests, an ordinance does not infringe a fundamental liberty interest unless it directly and substantially affects it. *See* Motion at 10; *see also, e.g., Zablocki v. Redhail* , 434 U.S. 374, 386-87 (1978) (ruling that statutory classification that "directly and substantially" interfered with right to marry burdened fundamental right); *Williams v. Wisconsin*, 336 F.3d 576, 582 (7th Cir. 2003) (declining to apply strict scrutiny when state rule only incidentally interfered with fundamental right to marry, affecting either its timing or place but not prohibiting it).

The Amended Ordinance does not, on its face, regulate family association or ability to earn a living. Nor does the Complaint shed light on the manner in which the ordinance allegedly intrudes on these rights. Indeed, as the Town points out, the Amended Ordinance neither regulates the Plaintiffs' family living arrangements, establishes an absolute ban on the issuance of Permits to them nor precludes them from earning a living by developing property in other towns, building houses in the Town for other individuals who obtain Permits or selling their Town property to others who are able to obtain Permits. *See* Motion at 10-11. In short, the Complaint is devoid of any factual assertion suggesting even a tangential or incidental – let alone substantial – interference with the Plaintiffs' fundamental rights. Even post-*Swierkiewicz*, there is not enough to sustain a claim in the face of a Rule 12(b)(6) challenge. *See, e.g., In re Colonial Mortgage Bankers Corp*., 324 F.3d 12, 15 (1st Cir. 2003) (noting that in the process of reviewing dismissal of an action for failure to state a claim, "we assume the truth of all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability. We are not bound, however, to credit bald assertions, unsupportable conclusions, and opprobrious epithets woven into the fabric of the complaint.") (citations and internal quotation marks omitted); *Torres-Viera*, 311 F.3d at 108 ("While Plaintiffs are not held to higher pleading standards in § 1983 actions, they must plead enough for a necessary inference to be reasonably drawn.") (citation omitted).

A final point remains to be addressed: whether the Plaintiffs' invocation of the so-called "irrebuttable presumption doctrine" saves their substantive-due-process claims from dismissal. *See* Opposition at 6-10 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647-48 (1974) (striking down on due-process grounds public schools' irrebuttable presumption that every teacher who reached fifth or sixth month of pregnancy was incapable of continuing teaching); *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973) (striking

down on due-process grounds Connecticut statute's irrebuttable presumption of non-residency for purposes of qualifying for reduced tuition rates at state university)).

As the Town points out, the continuing vitality of this doctrine is in serious doubt. *See* Defendant's Reply to Plaintiffs' Opposition to Motion To Dismiss ("Reply") (Docket No. 10) at 4-5; *Catlin v. Sobol*, 93 F.3d 1112, 1118-19 (2d Cir. 1996) (noting criticisms of irrebuttable-presumption doctrine; upholding, as neither irrational nor arbitrary, state statute conclusively presuming, for purposes of entitlement to free public education, that child resides with parents in absence of parental abandonment); *Brennan v. Stewart*, 834 F.2d 1248, 1258 (5th Cir. 1988) (noting, "The 'irrebuttable presumption' doctrine was a strange hybrid of 'procedural' due process and equal protection invented by the Supreme Court in the early 1970s, and laid to rest soon after."); *Schanuel v. Anderson*, 708 F.2d 316, 318-19 (7th Cir. 1983) (observing, "The 'irrebuttable presumption doctrine' of *LaFleur* flowered briefly, with courts requiring the government to make individualized determinations on matters affecting a wide range of interests. In 1976, however, the Supreme Court declined to apply the doctrine, and instead upheld a mandatory retirement rule. Since that time the continuing validity of the doctrine has been questioned repeatedly; this court refused to apply it as early as . . . 1979[.]").

The widely criticized and largely discredited irrebuttable-presumption doctrine does not trump the First Circuit's clear and repeated directives concerning the proper mode of analysis of substantive-due-process challenges to zoning ordinances.

Inasmuch as the Plaintiffs could prove no set of facts pursuant to which they would prevail on their substantive-due-process claims, the Town is entitled to dismissal of those claims pursuant to Rule 12(b)(6).[4]

C. Count III(B): Unreviewable Discretion in CEO

The Plaintiffs finally claim that the Amended Ordinance vests unreviewable discretion in the CEO in violation of the separation-of-powers provision of the Maine constitution and the due process clause of the federal Constitution. *See* Complaint ¶¶ 37-38.

The Town posits that the CEO's decisions pursuant to the Amended Ordinance are not "unreviewable" (and hence its motion to dismiss with respect to this claim should be granted) inasmuch as review is available in the Maine Superior Court pursuant to Maine Rule of Civil Procedure 80B. *See* Motion at 13-14; Reply at 5-6. I agree. Rule 80B provides, in relevant part:

> When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission or officer, is provided by statute or is otherwise available by law, proceedings for such review shall . . . be governed by these Rules of Civil Procedure as modified by this rule.

Me. R. Civ. P. 80B(a).

The Town identifies no statute or ordinance providing a right of review to the Superior Court from decisions made by the CEO pursuant to the Amended Ordinance. *See* Motion at 13-14; Reply at 5-6. However, it argues that review is "otherwise available by law." *See* Reply at 6; *see also, e.g., Town of*

[4] The outcome is no different with respect to the Plaintiffs' Maine constitution-based substantive-due-process claim. *See Bushey v. Town of China*, 645 A.2d 615, 618 (Me. 1994) ("unless fundamental rights are implicated, substantive due process challenge to zoning ordinance is inappropriate") (citation omitted); *National Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 460 (Me. 1977) ("Reasonableness in the exercise of the State's police power requires that the purpose of the enactment be in the interest of the public welfare and that the methods utilized bear a rational relationship to the intended goals. The reasonableness of a legislative enactment, however, is presumed. It is the burden of the person challenging a statute to demonstrate the lack of any state of facts supporting the need for the challenged enactment, and thus demonstrate its unreasonableness.") (citations, internal quotation marks and footnote omitted).

Windham v. Portland Water Dist., 537 A.2d 216, 219 (Me. 1988) ("Appeals 'otherwise available by law' include actions formerly brought under common law extraordinary writs, such as mandamus, certiorari and prohibition. In order for an appeal to be properly brought under the writ of certiorari, an appellant had to demonstrate that he was appealing from a decision of a governmental agency performing a judicial or quasi-judicial function.") (citations omitted).

I find no Maine case holding Rule 80B unavailable as a vehicle for direct review of a CEO's decision when that decision otherwise would be final. The Maine Superior Court recently has suggested that the converse is true: *i.e*., that a plaintiff may directly appeal a decision of a CEO or building inspector to the Superior Court pursuant to Rule 80B when (as is the case here) no appeal to a zoning board of appeals is provided:

> . . . The situation in light of [*Town of Boothbay v*.] *Jenness*[, 822 A.2d 1169 (Me. 2003),] and its predecessors seems to be that res judicata can result from the failure of a defendant to take advantage of an available administrative or judicial appeal even if that determination comes in the form of a notice of violation issued by a code enforcement officer without the benefit of a hearing or an opportunity to explore legal issues. However, before the failure to appeal will be given such preclusive effect, the plaintiff must show that the defendant was given adequate notice both of his right to appeal *and* of the consequences of failing to appeal.
>
> Turning to the present case, the CEO's letter of October 2, 2002, is clearly labeled "Notice of Violation and Compliance Order." The notice describes the procedural background of the Ordinance and the inspection the CEO conducted. The CEO stated specific violations and the reasons for those findings. Finally, the letter notes that the final order may be appealed to the Superior Court pursuant to Rule 80B. However, unlike the notice in *Jenness*, which stated that the defendant must file appeal "or forever forfeit that right," there was no warning in the present notice of the consequences of failing to appeal. This failure becomes especially critical in the present case where there is no municipal administrative body available to review the CEO's conclusions and the only way for the defendant to receive the opportunity for hearing and formulation of the legal and factual issues and finality of judgment lay in an immediate appeal to the Superior Court. It seems unlikely to this court that the average citizen faced with a summary letter from a town code enforcement officer would understand that she must immediately exercise an appeal in the

> Superior Court or forever lose her right to challenge the Ordinance or the CEO's interpretation.

Town of Farmingdale v. Fisher, No. Civ.A.CV-02-213, 2003 WL 21958195, at *2-*3 (Me. Super. Ct. July 15, 2003) (emphasis in original).

Were the Law Court confronted with the issue, it likely would hold the decision of the CEO in this case reviewable pursuant to Rule 80B.[5] The Town accordingly is entitled to dismissal of Count III(B) to the extent predicated on the Plaintiffs' assertion that the Amended Ordinance vests unreviewable discretion in the CEO.

That said, the Plaintiffs clarify in their opposition brief that there is a second predicate underpinning Count III(B): the vagueness of the standard pursuant to which the CEO is to exercise his or her discretion. *See* Opposition at 11; *see also, e.g., Kosalka v. Town of Georgetown*, 752 A.2d 183, 186 (Me. 2000) (noting that "[d]evelopers are entitled to know with reasonable clarity what they must do under state or local land use control laws to obtain the permits or approvals they seek"). The Town fails even to respond to this assertion, falling short of demonstrating entitlement to dismissal of Count III(B) as it pertains to this aspect of the Plaintiffs' claim.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion To Dismiss be **GRANTED** as to Counts I, II, III, IV and that portion of Count III(B) attacking the Amended Ordinance on the basis that it vests

[5] It is clear under Maine law that CEO decisions are directly reviewable pursuant to Rule 80B in cases in which a plaintiff had good reason for a failure to avail himself or herself of an available avenue of administrative review (typically, review by a zoning board of appeals). *See, e.g., Jenness*, 822 A.2d at 1175-76 (holding that property owner's failure to timely appeal CEO's violation notice to town's Zoning Board of Appeals, despite CEO's provision of notice informing owner of her appeal rights, interposed *res judicata* bar to owner's subsequent challenge of CEO's decision in court); *Town of Freeport v. Greenlaw*, 602 A.2d 1156, 1160-61 (Me. 1992) (holding property owner not barred by *res judicata* from contesting CEO's action, despite his failure to take advantage of available appeal to town's Zoning Board of Appeals, inasmuch as he received no notice of his appeal rights). By the Superior Court's logic in *Farmingdale*, the necessity for *(continued on next page)*

unreviewable discretion in the CEO, and **DENIED** as to Count V and that portion of Count III(B) challenging the Amended Ordinance on the basis that the standard pursuant to which the CEO is to exercise his or her discretion is impermissibly vague.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of October, 2003.

_____
David M. Cohen
United States Magistrate Judge

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review of a CEO decision pursuant to Rule 80B is heightened when no administrative appeal right even exists.

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